

**Gary L. Phillips**  
General Attorney &  
Assistant General Counsel

SBC Telecommunications, Inc.  
1401 Eye Street, NW,  
Suite 400  
Washington, D.C. 20005  
Phone: 202-326-8910  
Fax: 202-408-8731



May 4, 2004

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW – Lobby Level  
Washington, D.C. 20554

Re: ***CC Docket No. 01-338, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers***

Dear Ms. Dortch:

On May 3<sup>rd</sup>, 2004, the attached letter was sent via facsimile and overnight delivery to the Honorable Michael K. Powell, the Honorable Kathleen Q. Abernathy, the Honorable Jonathan S. Adelstein, the Honorable Michael J. Copps, and the Honorable Kevin J. Martin from James C. Smith, Senior Vice President of SBC Communications, Inc.

I ask that this letter be placed in the files for the proceeding identified above. Should you have any questions or require any additional information, please do not hesitate to contact me.

Sincerely,

**/s/ Gary L. Phillips**

cc (via electronic mail):

Honorable Michael K. Powell  
Honorable Kathleen Q. Abernathy  
Honorable Michael J. Copps  
Honorable Kevin J. Martin  
Honorable Jonathan S. Adelstein



**James C. Smith**  
Senior Vice President

SBC Telecommunications, Inc.  
1401 I Street, N.W.  
Suite 1100  
Washington, DC 20005-2225

202.326.8836 Phone  
202.289.3699 Fax  
James.C.Smith@sbc.com

May 3, 2004

The Honorable Michael K. Powell, Chairman  
The Honorable Kathleen Abernathy, Commissioner  
The Honorable Jonathan Adelstein, Commissioner  
The Honorable Michael Copps, Commissioner  
The Honorable Kevin Martin, Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, 8<sup>th</sup> Floor  
Washington, DC 20554

Dear Chairman Powell and Commissioners:

In response to the Commission's unanimous call for private commercial negotiations on the provision of wholesale products and services, SBC has entered into good faith discussions with a number of CLECs. Indeed, SBC has already reached one agreement with Sage Telecom and has made significant progress in its negotiations with other carriers. These negotiations are extremely sensitive and are being conducted, as commercial negotiations generally are, on a confidential basis. True commercial negotiations are impossible in the absence of confidentiality. Negotiating positions in one set of discussions that are disclosed to public view will inevitably taint other negotiations.

One carrier with whom SBC has been negotiating, pursuant to the terms of a non-disclosure agreement, is Talk America. Today, Talk America informed us that Commissioner Martin "ordered" Talk America to turn over to him "all proposals exchanged between Talk America and the ILECs with respect to the provision of UNEs after the USTA II mandate is issued; all responses by either party to the proposals made by the other; and any relating documentation showing the willingness of either party to facilitate a transition from a UNE-P to a facilities based UNE-L." Commissioner Martin apparently made this demand this morning, insisting that the materials be provided to him by 1 p.m. today.

Talk America notified SBC of this demand at 12:50 p.m. eastern time. A copy of that e-mail is attached to this letter. SBC immediately objected to the production on the grounds (1) that Commissioner Martin has no authority to make such a unilateral demand and (2) that the production would violate the non-disclosure agreement. In an e-mail from George Vinall, Executive Vice-President of Talk America, Talk America responded that it was "ordered" by Commissioner Martin to turn over these materials and that it had already done so. A copy of this e-mail is also attached.

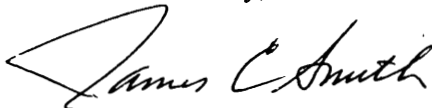
The Honorable Michael K. Powell, Chairman  
The Honorable Kathleen Abernathy, Commissioner  
The Honorable Jonathan Adelstein, Commissioner  
The Honorable Michael Copps, Commissioner  
The Honorable Kevin Martin, Commissioner  
May 3, 2004  
Page 2

A unilateral order by a single Commissioner for materials in a private commercial negotiation is not authorized in the statute or the Commission's rules. A single Commissioner, acting alone, has no delegated authority to demand the production of materials.

Furthermore, the materials were produced by Talk America in violation of a valid non-disclosure agreement signed by both parties. A copy of that agreement is attached to this letter. Under the terms of paragraph 6(g) of that agreement, covered materials may only be disclosed in response to a "valid order or request" of a "governmental body," and even then only after giving the objecting party an opportunity to seek a protective order. This Commission is a governmental body. Commissioner Martin is not, and his unilateral request to Talk America provides no basis for violating the terms of the non-disclosure agreement.

We ask for the prompt return of the materials improperly produced by Talk America, including any copies made while these materials were in the possession of the Commission. SBC also formally requests, consistent with the Nondisclosure Agreement and the Trade Secrets Act (18 U.S.C. § 1905), that these documents not be disseminated or their contents disclosed to third parties.

Yours Sincerely,

A handwritten signature in black ink, appearing to read "James C. Smith". The signature is fluid and cursive, with a large initial "J" and a stylized "S".

Cc: John Rogovin

-----Original Message-----

From: Kirk, Alan [mailto:AKirk@talk.com]

Sent: Monday, May 03, 2004 11:50 AM

To: REGAN, MARY P (AIT)

Subject: Re: Section 6(g) of the Nondisclosure Agreement between Talk America Inc. and SBC Telecommunications, Inc. executed on April 6, 2004

Pursuant to Section 6(g) of the Nondisclosure Agreement between Talk America Inc. and SBC Telecommunications, Inc. executed on April 6, 2004, I am writing to provide SBC written notice of an official written request that Talk America has received today from The Honorable Kevin J. Martin, Commissioner of the Federal Communications Commission, to deliver by 1:00 PM today the following documents, some of which may be subject to the terms of the Agreement: all proposals exchanged between Talk America and the ILECs with respect to the provision of UNEs after the USTA II mandate is issued; all responses by either party to the proposals made by the other; and any relating documentation showing the willingness of either party to facilitate a transition from a UNE-P to a facilities based UNE-L. Talk America is compelled by the Commissioner's request, as it is a valid request of the FCC for information pursuant to Sections 4(i), 4(j), 218 and 403. Talk America is in the process of compiling the documents and fully intends to comply with Commissioner Martin's request. Please give me a call to discuss at your convenience.

Alan Kirk  
Vice-President, Network Vendor Management  
Talk America  
703-391-7567

-----Original Message-----

From: Vinall, George [mailto:gvinall@talk.com]  
Sent: Monday, May 03, 2004 1:32 PM  
To: REGAN, MARY P (AIT)  
Cc: Kirk, Alan; Pizer, Craig  
Subject: Order from Commissioner Martin

Mary Pat:

This morning our outside counsel received a telephone call from Dan Gonzalez on behalf of Commissioner Martin ordering us to provide information as detailed in his confirmation below:

----

-----Original Message-----

From: Daniel Gonzalez [mailto:Daniel.Gonzalez@fcc.gov]  
Sent: Monday, May 03, 2004 10:58 AM  
To: Mutschelknaus, Brad  
Subject: RE: Confirmation of Document Request

Brad:

Your understanding is correct. Commissioner Martin would like copies of all proposals exchanged between Talk America and the ILECs with respect to the provision of UNEs after the USTA II mandate is issued. In particular, Commissioner Martin would like copies of all responses by either party to the proposals made by the other; and any relating documentation showing the willingness of either party to facilitate a transition from a UNE-P to a facilities-based UNE-L. Thank you for your assistance. -Dan.

----

I subsequently confirmed this order directly with Mr. Gonzalez by telephone. After which I released the pertinent information to his office.

Regards,

George Vinall  
EVP, Business Development

## NONDISCLOSURE AGREEMENT

1. This Nondisclosure Agreement ("Agreement") is made, effective as of April 6, 2004, by and between SBC Telecommunications, Inc. and each of its subsidiaries and affiliates (collectively "SBC"), and Talk America Inc. and each of its subsidiaries and affiliates (collectively "Carrier") (SBC and Carrier may each be referred to individually as a "Party" and collectively the "Parties").
2. This Nondisclosure Agreement is intended to facilitate and expedite review of certain information provided by SBC to Carrier, and by Carrier to SBC, in connection with negotiations concerning the terms and conditions, including prices, of a private commercial agreement between the Parties (the "Negotiations"). "Confidential Information" means any information or data disclosed by a Party (the "Disclosing Party") to the other Party (the "Recipient") under or in contemplation of this Agreement and which (a) if in tangible form or other media that can be converted to readable form, is clearly marked as proprietary, confidential or private when disclosed, or (b) if oral or visual, is identified as proprietary, confidential, or private on disclosure and is summarized in a writing so marked and delivered within ten (10) days following such disclosure.
3. The terms "Disclosing Party" and "Recipient" include each of Party's corporate subsidiaries and affiliates that discloses or receives Confidential Information. The rights and obligations of the Parties shall therefore also inure to such affiliates and may be directly enforced by or against affiliates.
4. The Recipient of Confidential Information contemplated by this Agreement hereby acknowledges that such information, if publicly disclosed, could cause competitive injury to the Disclosing Party. It is the purpose and intent of this Agreement to permit prompt access to and review of the designated information as the Parties are willing to disclose without first obtaining a determination as to the confidentiality or proprietary nature of the Confidential Information. The Parties will label or otherwise designate such Information as "Confidential," "Proprietary," or "Private." Access to and review of the Confidential Information is provided for limited purposes appropriate to the aforementioned Negotiations, consistent with maximum protection of the Confidential Information. Accordingly, the Parties are willing to permit access to and review of the Confidential Information, under the terms and conditions specified herein, and the undersigned Parties agree that access and review of Confidential Information is subject to those terms and conditions. The parties agree upon the following terms and conditions:
  - (a) Confidential Information shall be used by the Recipient only for purposes directly related to the Negotiations;
  - (b) Disclosure of Confidential Information shall be restricted to employees of the Recipient and its affiliates, and their counsel and outside experts (provided that such counsel and outside experts agree in writing to be bound by the terms of this Agreement) and therefore agree that no confidential information gained during these negotiations shall be directly or indirectly disclosed to any other client, who have a "need to know" for purposes related to the Negotiations and will not be

made to any other person or entity without the prior written consent of the Disclosing Party.

- (c) Employees who access the Confidential Information shall first be advised of their obligations with respect thereto;
  - (d) Confidential Information shall be copied only as necessary for those personnel who are entitled to receive it, and the Recipient shall ensure that all confidentiality notices are reproduced in full on such copies; and
5. For the purposes of this Agreement only, "employees" include third parties retained by a Party for temporary administrative, clerical or programming support, expert advice or professional assistance. A "need to know" means that the employee requires the Confidential Information to perform their responsibilities in connection with the Negotiations.
6. The obligations of Paragraph 4 shall not apply to any Confidential Information which the Recipient can demonstrate:
- (a) Is or becomes available to the public through no breach of this Agreement;
  - (b) Was previously known by the Recipient without any obligation to hold it in confidence;
  - (c) Is received from a third party free to disclose such information without restriction;
  - (d) Is independently developed by the Recipient without the use of Confidential Information of the Disclosing Party;
  - (e) Is approved for release by written authorization of the Disclosing Party, but only to the extent of such authorization;
  - (f) Is required by law or regulation to be disclosed, but only to the extent and for the purposes of such required disclosure; or
  - (g) Is disclosed in response to a valid order or request of a court or other federal or state governmental body of the United States or any political subdivisions thereof, but only to the extent of and for the purposes of such order, and only if the Recipient first notifies the Disclosing Party to seek an appropriate protective order.
7. If the Disclosing Party inadvertently fails to mark as proprietary, confidential, or private information for which it desires confidential treatment, it shall so inform the Recipient. The Recipient thereupon shall return the unmarked information to the Disclosing Party, and the Disclosing Party shall substitute properly marked information. In addition, if the Disclosing Party, at the time of disclosure, inadvertently fails to identify as proprietary, confidential or private oral or visual information for which it desires confidential treatment, it shall so inform the Recipient, provided that the Disclosing Party shall summarize the information in writing within ten (10) days thereafter. The Recipient's obligations under Paragraph 4 in connection with information encompassed by this

Paragraph shall commence upon notice from the Disclosing Party of the failure to properly mark or identify the information.

8. Each Party shall comply with applicable export laws and regulations of the United States with respect to any technical data received under this Agreement.
9. Each Party has the right to refuse to accept any Confidential Information under this Agreement, and nothing herein shall obligate either Party to disclose to the other Party any particular information.
10. Confidential Information, including permitted copies, shall be deemed property of the Disclosing Party. The Recipient shall, within twenty (20) days of a written request by the Disclosing Party, return to the Disclosing Party or destroy all Confidential Information (or any designated portion thereof), including all copies thereof, and shall not retain any copies, in whole or in part (including any derivative materials). The Recipient shall also, within ten (10) days of a written request by the Disclosing Party, certify in writing that it has satisfied its obligations under this Paragraph.
11. The Parties agree that an impending or existing violation of any provision of this Agreement would cause the Disclosing Party irreparable injury for which it would have no adequate remedy at law, and agree that the Disclosing Party shall be entitled to obtain immediate injunctive relief prohibiting such violation, in addition to any other rights and remedies available to it.
12. Neither this Agreement nor any discussion or disclosures hereunder shall (a) be deemed a commitment to any business relationship, contract, or future dealing with the other Party, or (b) prevent either Party from conducting similar discussions or performing similar work to that hereunder so long as such discussions or work do not violate this Agreement.
13. No patent, copyright, trademark, or other proprietary right is licensed, granted, or otherwise transferred by this Agreement or any disclosure hereunder, except for the right to use such information in accordance with this Agreement. No warranties of any kind are given with respect to the Confidential Information disclosed under this Agreement or any use thereof, except that the Disclosing Party warrants that it has the authority to make the disclosures contemplated hereunder.
14. This Agreement shall be effective as of the date first written above and shall continue until terminated by either Party upon thirty (30) days prior written notice. All obligations undertaken respecting Confidential Information disclosed hereunder shall survive termination of this Agreement.
15. This Agreement may not be assigned by either Party without the prior written consent of the other. No permitted assignment shall relieve the Recipient of its obligations hereunder with respect to Confidential Information disclosed to it prior to the assignment. Any assignment in violation of this Paragraph shall be void. This Agreement shall be binding upon the Parties' respective successors and assigns.
16. If any provision of this Agreement shall be held invalid or unenforceable, such provision shall be deemed deleted from this Agreement and replaced by a valid and enforceable provision which so far as possible achieves the Parties' intent in agreeing to the original



provision. The remaining provision of this Agreement shall continue in full force and effect.

17. Each Party warrants that it has the authority to enter into this Agreement for itself and its subsidiaries and affiliates.
18. This Agreement represents the entire understanding between the Parties with respect to the subject matter hereof and supersedes all prior communications, agreements, and understandings relating thereto. The provisions of this Agreement may not be modified, amended, or waived, except by a written instrument duly executed by both Parties. This Agreement shall be governed in all respects by the domestic laws of the State of Texas.
19. The Agreement is binding with respect to each signatory party as of the date of execution thereof, as described below, and each executed copy of the Agreement will be deemed an original by the signatories executing the same.

Executed this 6<sup>th</sup> day of April, 2004.

TALK AMERICA INC.  
AND ITS SUBSIDIARIES  
AND AFFILIATES

SBC TELECOMMUNICATIONS, INC.  
AND ITS SUBSIDIARIES AND  
AFFILIATES

By: Aloysius T. Lawn IV  
Aloysius T. Lawn IV

EVP - General Counsel  
(Title)

By: Mary Pat Regan  
Mary Pat Regan

Director Local Interconnection  
(Title)